No. 383

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1942.

LESTER H. BARNHART, CLINTON R. SMITH, GEORGE W. YONTZ, ET AL., ETC.,
Petitioners,

v.

WESTERN MARYLAND RAILWAY COMPANY

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

BRIEF IN OPPOSITION

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BRIEF IN OPPOSITION

OPINIONS BELOW

The opinion of the district court (R. 30-42) is reported in 41 F. Supp. 898. The opinion of the circuit court of appeals (R. 47-58) is reported in 128 F. 2d 709.

JURISDICTION

The decree of the circuit court of appeals was entered on June 11, 1942 (R. 59). Petition for a writ of certiorari was filed on September 8, 1942. The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether a substantial controversy arising under the laws of the United States within the meaning of Section 24(1) of the Judicial Code establishing the jurisdiction of the federal district courts is shown by allegations of a complaint in which the only federal rights asserted are alleged to arise out of the provisions of Title III of the Transportation Act of 1920 and out of decisions of the Railroad Labor Board created by it, where it further appears that by decisions of this court it has been conclusively established that such statutory provisions and such Board decisions created no enforceable legal rights whatsoever.

2. Whether, in an action brought in 1941 praying injunction against continued violation of an asserted contract of employment and for an accounting based on petitioners' alleged status as employees, the complaint is properly to be dismissed for laches where it is based on an alleged wrongful discharge of petitioners in 1922 and continued violation of the contract thereafter and where it alleges no fraud, concealment or other reason excusing lack of diligence.

STATUTES INVOLVED

The Judicial Code, Section 24, 28 U. S. C., Sec. 41 provides:

> The district courts shall have original jurisdiction as follows:
>
> (1) First. Of all suits of a civil nature, at common law or in equity * * * where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of $3,000, and (a) arises under the Constitution or laws of the United States * * *

STATEMENT

Complaint was filed June 27, 1941, in the United States Court for the District of Maryland on behalf of seven named plaintiffs and approximately 1,200 other alleged employees of the respondent, Western Maryland Railway Company. The action, in the nature of a class suit, prayed judgment for (1) an injunction against respondent's continuing to treat the plaintiffs as no longer employees and continuing to deprive them of wages, earnings, rights, privileges and property as such; and (2) an accounting for loss and denial of wages, earnings, rights and other claims as employees appurtenant to their alleged status as employees from March 16, 1922, to date (R. 2-16).

The respondent filed a motion to dismiss on the grounds, among others, that the court had no jurisdiction and that the claims of the plaintiffs are barred by the statute of limitations and by laches (R. 29-30).

The district court dismissed on the ground that the complaint failed to raise a federal question and that the action was barred by limitations and laches (R. 30-42). The circuit court of appeals, viewing the action as in the nature of a suit in equity, affirmed on the ground that there was nothing in the complaint to establish federal court jurisdiction and that the claim was in any event barred by laches (R. 47, 51-57).

The pertinent allegations of the complaint may be summarized as follows:

Lester H. Barnhardt and the six other named plaintiffs constitute a committee representing and acting for Federated Shop Craft Employes, Maintenance of Way Employes, and Signalmen Employes, of the Western Maryland Railway Company, numbering some 1,200. They are as-

serted to be employees of the Company who have never been discharged as such "as prescribed and required by lawful agreements existing between them" and the Company. Defendant, a Maryland corporation engaged in interstate commerce, was returned to private ownership and management under the Transportation Act of 1920.[1]

Under Title III of the Act,[2] the Railroad Labor Board by Decision No. 119, April 14, 1921, extended the National Agreement Rules[3] until July 1, 1921, and ordered carriers and employees to hold conferences and agree upon as many rules as possible.

On November 29, 1921, by Addendum No. 6 to its Decision No. 222, the Board promulgated a complete set of rules "to take the place of the Rules in the National Agreement" and ordered them combined with the agreed rules so as to form a working agreement. The Company "accepted this Agreement, printed it and put it into effect" (R. 3-4).

The Company and the employees represented by the three organizations above-named also entered into contracts and agreements known as "Negotiations of Rules and Working Conditions Under Decision 119 of the United States Railway Labor Board"[4] (R. 4). Essential parts of the Contracts and Agreements were Rule 37, providing, among other things, against dismissal of employees without a fair hearing, and Rule 183 providing that should either employer or employees desire to revise the rules, "a written

[1] Act of February 28, 1920, c. 91, 41 Stat. 456.

[2] Act of February 28, 1920, c. 91, secs. 300-316, 41 Stat. 456, 469-475.

[3] These rules were established by agreement between National Labor Unions and the Director General of Railroads who operated the railroads until March 1, 1920, under authority of the Act of August 29, 1916, c. 418, 39 Stat. 619, 645.

[4] The contracts themselves are not set out or annexed to the complaint which states that copies thereof are in the possession of the Company and it will be called upon to produce them at the hearing.

statement containing proposed changes shall be given, and conference held within 30 days to arrange details necessary to negotiate to a conclusion" (R. 4-5).

The complaint further alleged (Paragraph 6) that the respondent "in violation of said Contracts and Agreements last above mentioned on March 16, 1922" discharged and dismissed the plaintiffs without having complied with Rules 37 and 183, and that the Company has since refused to permit them to perform their duties under said Contracts and has prevented them from performing the same (R. 5).

As particulars of the discharge, the complaint alleges (R. 7-8):

The Company "in violation of said Transportation Act of 1920 and of the wage and rule Decisions of the Labor Board, undertook to remove [the plaintiffs] from the jurisdiction of the Board" by letting out to private contractors the operation of its railway shops; that on March 11, 1922, the Company posted notice that effective March 16, 1922, substantially all positions in the maintenance of equipment or mechanical department would be abolished (R. 7-8).

On March 23, 1922, a committee representing plaintiffs notified each of the four private contractors that unless by March 25, 1922, they put into effect the rates prescribed by Decision No. 147 of the Board and the rules and working conditions agreed upon between the Company and the plaintiffs' committees, plus the rules and working conditions promulgated in the orders of the Board, they would strike (R. 8-9).

On March 25, 1922, substantially all of the employees involved left the service of the four contractors upon the

ground that the contracts were "to evade compliance with the provisions of the Transportation Act of 1920 and the rules and wage decisions of said Labor Board" (R. 9).

The Board took jurisdiction of the dispute. In its opinion dated November 13, 1922, Decision No. 1361,[5] the Board rejected the Company's contention that the men were no longer employees of the Company and so beyond the jurisdiction of the Board. It also overruled the Company's contention that the plaintiffs lost their right to oppose the shop contracts because they discontinued work. It held (a) that the contracts with the contractors violated the Transportation Act and Decisions of the Board; and (b) that the employes were under the jurisdiction of the Board and subject to the Transportation Act and Board decisions. It directed the Company to take up reinstatement with any applying employe (R. 9-11).

After setting out these particulars, the complaint further alleged: The Company denied the jurisdiction and authority of the Board and refused to accept and apply it. The Company continued to maintain and carry out its contracts with the four contractors and to hold and treat plaintiffs as no longer employees entitled to all their various rights "under and by virtue of the contracts and agreements". Although the plaintiffs called off the strike, the Company continued to refuse to give effect to its Contracts and Agreements of employment and the decisions of the Board or to the rights of plaintiffs thereunder (R. 11-12).

On February 1, 1934, the Co-ordinator of Railroads of the United States ordered the contracts of the Company with the Contractors abolished as improper, wrongful and il-

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[5] The decision of the Board is set out at length as an exhibit to the complaint (R. 16-29).

legal and they were accordingly abrogated and terminated (R. 12).

In 1934, the plaintiffs submitted the dispute to Division No. 2 of the Railway Adjustment Board at Chicago, but it decided it had no jurisdiction.[6] In 1935, upon inquiry by L. H. Barnhardt, the National Mediation Board disclaimed jurisdiction.[7] In 1940 a similar inquiry addressed to the National Labor Relations Board was forwarded to the National Mediation Board which again disclaimed jurisdiction (R. 13).

The complaint, in conclusion, alleged that the conduct of the Company has unlawfully and wrongfully denied and deprived plaintiffs of their wages and other rights and has imposed upon them irreparable injury and loss "in violation of said Contracts and Agreements between said Employes and said Railway Company and of the Decisions aforesaid of said Railroad Labor Board * * *" (R. 14).

The prayer is that the court declare that the Company has violated its "obligations and duties to the Plaintiffs * * * which arose and accrued to the Plaintiffs out and by reason of the said Contracts of employment between said Company and said Employes, and said Decisions of said Labor Board" and that plaintiffs are entitled to redress. The prayer also asks an injunction and an accounting for all losses suffered by plaintiffs as employees of the Company "from its violation of said Contracts and Agreements of employment on March 16, 1922, to the present time, and growing out of * * * their status and rights * * * as employes of said Defendant Company" (R. 15).

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[6] The National Railroad Adjustment Board was established by the Railway Labor Act, May 20, 1926, sec. 3, c. 347, 44 Stat. 577, 578, as amended by the Act of June 21, 1934, c. 691, sec. 4, 48 Stat. 1185, 1189.

[7] The National Mediation Board was established by the Railway Labor Act, May 20, 1926, sec. 4, c. 347, 44 Stat. 577 as amended by the Act of June 21, 1934, c. 691, §4, 48 Stat. 1185, 1193, 45 U. S. C. sec. 154.

The decisions of the courts below.—The district court pointed out that this Court has conclusively held that the Transportation Act and Board decisions under it create no legal rights. On that ground, it held that the complaint fails to show a substantial controversy arising under the Constitution or laws of the United States (28 U. S. C. Sec. 41(1)). No other basis for jurisdiction having been suggested, it concluded that the court was without jurisdiction (R. 30, 34-39). As another and independent ground for dismissal, the court, after raising a doubt as to the enforceability of the alleged contract of employment (R. 39-41), concluded that, in any event, whether viewed in the nature of an action at law or a suit in equity, the action was also barred by limitations and laches (R. 41-42). The circuit court of appeals affirmed on the grounds that the complaint failed to show jurisdiction (R. 47, 51-56) and that the action was barred by laches (R. 56-57, 58). It entered a decree accordingly (R. 59).

ARGUMENT

The petition discloses no special or important reason recognized by this Court as a proper occasion for the allowance of the writ of certiorari. There is no conflict with decisions of this Court or of other circuits. The applicable law, established by the numerous and uniform decisions of this Court, has been recognized and been given full effect by the courts below (R. 38, 53-54).

The complaint permits only of the conclusion that it was properly dismissed as involving no controversy arising under Federal law, and as well on the separate ground of laches.

A. THE FAILURE OF PETITIONERS' COMPLAINT TO ALLEGE A SUBSTANTIAL FEDERAL QUESTION REQUIRES THAT IT BE DISMISSED.

The complaint contains no allegations of diversity of citizenship and federal jurisdiction must be sustained, if at all, upon the ground asserted in the Petition (p. 11) that within the meaning of Section 24(1) of the Judicial Code the complaint discloses a suit in equity in which the matter in controversy arises under the laws of the United States. 28 U. S. C. Sec. 41(1).

The complaint fails to comply with Rule 8(a) of the Rules of Civil Procedure or with the requirement that the ground of jurisdiction be affirmatively and distinctly set forth, not by inference or argumentatively, but by positive and direct averments. *Shulthis* v. *McDougal,* 225 U. S. 561, 569; *Hull* v. *Burr,* 234 U. S. 712, 720; *Norton* v. *Larney,* 266 U. S. 511, 515; *Smith* v. *McCullough,* 270 U. S. 456, 459.

However, giving its allegations the most favorable interpretation possible, the complaint can only be read as relying upon rights asserted to have been created (1) by the Transportation Act or decisions of the Labor Board standing alone, or (2) by the Act or decisions of the Labor Board taken together with alleged contracts and agreements of petitioners with respondent, or (3) by such alleged contracts and agreements alone. It is unnecessary to determine which since the complaint, given any or all of these constructions, clearly fails to show a matter in controversy arising under a law of the United States.

Petitioners here contend that the averments of the complaint show rights in them by virtue of the Transportation Act and under their alleged contract with respondent. In the complaint, petitioners appear to rely largely on decisions of the Board as the basis for the asserted federal

rights (R. 7, 9-11, 14, 15), but in the Petition emphasis has been shifted from decisions of the Board to the Act itself. In addition to general references to the Transportation Act, petitioners now rely specifically (Pet. 12, 37) on Section 301 of the Transportation Act, 41 Stat. 469:

> It shall be the duty of all carriers and their officers, employees and agents to exert every reasonable effort and adopt every available means *to avoid any interruption to the operation of any carrier* growing out of any dispute between the carrier and the employees or subordinate officials thereof. (Emphasis supplied.)

Aside from an attempt to distort this into an admonition to use all reasonable effort and available means *to avoid dispute with employees* (Pet. 13), the petition, although in some places relying on the Act alone as the source of the alleged rights (Pet. 13, 34), for the most part adheres to the coupling of the Act with the contracts as a unitary source of such rights (Pet. 12, 23, 31, 38).[8]

This transparent device, which also appears in the complaint (R. 4, 14, 15) and in the Exhibit (R. 23-24) upon which the petition in part relies (Pet. 17-19), cannot conceal the fact that no substantial federal right is here involved.

It is conclusively established by decisions of this Court that the Transportation Act or Board decisions under it created no rights in either employer or employees.—This Court has twice ruled that no rights accrued to either employer or employees by virtue of the Transportation Act

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[8] Statements in petitioners' argument that respondent claimed a right under the Transportation Act to repudiate it (Pet. 12, 13, 32) are apparently directed to showing that the complaint alleged a right under federal law asserted as a defense by respondent. The answer is that such allegations beyond, and unnecessary to, the statement of the cause of action cannot be made the basis of jurisdiction. *Boston &c. Mining Co.* v. *Montana Ore Co.*, 188 U. S. 632, 640; *Joy* v. *St. Louis*, 201 U. S. 332, 341; *Devine* v. *Los Angeles*, 202 U. S. 313, 334; *The Fair* v. *Kohler Die & Specialty Co.*, 228 U. S. 22, 25; *Gully* v. *First Nat. Bank*, 299 U. S. 109, 113.

of 1920 or as a result of decisions of the Railroad Labor Board created by it. In *Pennsylvania R. R.* v. *Labor Board,* 261 U. S. 72, upholding dismissal of a bill by the railroad to enjoin publication of the Board's findings, this Court said (p. 79):

> The decisions of the Labor Board are not to be enforced by process. The only sanction of its decision is to be the force of public opinion invoked by the fairness of a full hearing, the intrinsic justice of the conclusion, strengthened by the official prestige of the Board, and the full publication of the violation of such decision by any party to the proceeding.

In *Pennsylvania Federation* v. *Pennsylvania R. R. Co.,* 267 U. S. 203, this Court dealt with a subsequent suit by a union of employees of the same company to enjoin what was charged to be a conspiracy on the part of the railroad to defeat the provisions of the Transportation Act of 1920 and to deprive the employees of the rights with which the provisions of Title III of the Act intended to vest them. Affirming the dismissal of the bill, this Court quoted from its decision in the previous litigation and unequivocally held (p. 215):

> It is clear from this language that in the *Labor Board Case* this Court has decided that there is nothing compulsory in the provisions of the statute as against either the Company or the employees upon the basis of which either acquired additional rights against the other which can be enforced in a court of law.
>
> * * * * * *
>
> [p. 216] But when the other sections of the Title are taken as a whole, they may be searched through in vain to find any indication in the mind of Congress or any intimation that the disputants in the controversies to be anticipated were in any way to be forced into compliance *with the statute* or *with the judgments pro-*

nounced by the Labor Board, except through the effect of adverse public opinion. [Emphasis supplied.]

* * * * * *

[p. 217] The Pennsylvania Company is using every endeavor to avoid compliance with the judgment and principles of the Labor Board * * * it is, so far as its dealings with its employees go, refusing to comply with the decisions of the Labor Board and is thus defeating the purpose of Congress. * * * All these things it might do and remain within its strict legal rights after it came fully into control of its railroad property subsequent to September 1, 1920. We do not think Congress, while it would deprecate such action, intended to make it criminal or legally actionable.

It is thus finally settled that petitioners have at no time had and do not now have either by virtue of the Transportation Act of 1920 or under decisions of the Labor Board created by it any right, privilege or immunity cognizable or enforceable in any court of law. *Texas & N. O. R. Co.* v. *Brotherhood of Ry. Clerks,* 281 U. S. 548, 560-562; *Virginian Ry.* v. *Federation,* 300 U. S. 515, 542.

Because the only rights under a federal law asserted by the complaint have been held conclusively to be non-existent, the suit involves no substantial federal question and was properly dismissed.—Regard for the legislative policy reflected in the statute conferring jurisdiction over suits arising under the laws of the United States requires that the federal courts confine their own jurisdiction to the limits defined by the statute. *Gully* v. *First Nat. Bank,* 299 U. S. 109, 114. Cf. *Healy* v. *Ratta,* 292 U. S. 263, 269-270; *Shamrock Oil Co.* v. *Sheets,* 313 U. S. 100, 108-109. And the complaint must allege facts showing a federal question not in mere form, but in substance. *Cuyahoga Co.* v. *Northern Ohio Co.,* 252 U. S. 388, 397.

Therefore, where as here, the unsoundness of the asserted federal question "so clearly results from the previous decisions of this Court as to foreclose the subject and leave no room for the inference that the questions sought to be raised can be the subject of controversy", the complaint must be dismissed. *Western Un. Tel. Co.* v. *Ann Arbor R'd Co.*, 178 U. S. 239, 244; *Levering & G. Co.* v. *Morrin*, 289 U. S. 103, 105-106; *Ex parte Poresky*, 290 U. S. 30, 31-32.

Any rights alleged in the complaint arise under state law and controversy with respect thereto does not arise under a law of the United States.—Point II of petitioners' argument (Pet. 34) requires but brief attention. It may be conceded, arguendo at least, that repeal of the Transportation Act did not divest or destroy personal and property rights which petitioners assert were "created and subsisting by virtue of that Act" and "came into existence and became vested by virtue of the provisions of that Federal Statute". The answer is that, as this Court has held, the Act created no legal rights. It was, therefore, unnecessary for the courts below to hold that the repeal of the Act destroyed such rights and they plainly did not do so.

In Point III petitioners appear to rely on allegations in their complaint that respondent entered into contracts and agreements with them (R. 4-5) and that respondent violated the obligations of these contracts. And they contend that allegations of the complaint aver rights and duties under "contracts actually made and given operation by the parties to them, under and by virtue of the *federal Act* (Pet. 38) or "pursuant to the provisions and purposes of the Act" (Pet. 38) or, as alternatively stated, rights "directly referable now to federal Act of 1920 and the Contracts which created them under the authority and provisions of that Act" (Pet. 23).

It is unnecessary to argue whether the complaint is capable of this interpretation. Allegations that rights have their origin in a federal statute are insufficient. *Shulthis* v. *McDougal*, 225 U. S. 561, 569; *Shoshone Mining Company* v. *Rutter*, 177 U. S. 505, 507; *Gully* v. *First Nat. Bank*, 299 U. S. 109, 114.

Furthermore, it is plainly irrelevant here whether such contracts have their origin in, or even include in terms or by reference, provisions of the Transportation Act or of Board Decisions. For the decisive factor is the non-federal nature of the right here asserted. *Puerto Rico* v. *Russell & Co.*, 288 U. S. 476, 483. It having been decided by this Court that the Act and decisions of the Board created no legally enforceable obligations, suit obviously can be maintained, if at all, not by virtue of the Act of Congress, but only by virtue of Maryland law; inquiry along Federal lines would be only incidental to a determination of the local question of what the agreement of the parties is and of what, under the sanctions of state law, they will be held obligated to do. *Miller's Executors* v. *Swann*, 150 U. S. 132, 136-137; *Louisville & Nash. R. R. Co.* v. *Western Un. Tel. Co.*, 237 U. S. 300, 303; *Interstate Railway Co.* v. *Massachusetts*, 207 U. S. 79, 84-85; *Teague* v. *Brotherhood of Locomotive Firemen*, 127 F. 2d 53, 55 (C. C. A. 6). Since this suit is necessarily built upon alleged contracts which in point of obligation must have their genesis in the law of Maryland and of that State alone, and since "a suit arises under the law that creates the cause of action", it must be concluded that, as the court below held (R. 55), the instant case does not arise under any statute of the United States so as to confer jurisdiction on the United States District Court. *Gully* v. *First Nat. Bank*, 299 U. S. 109, 114; *American Well Works* v. *Layne*, 241 U. S. 257, 260.

B. THE PREJUDICIAL AND UNEXPLAINED DELAY OF 19 YEARS IN BRINGING SUIT REQUIRES THAT THE SUIT BE DISMISSED FOR LACHES.

The bar of laches is upheld by the circuit court of appeals on two grounds: First, whether this be regarded as a case of concurrent or of exclusive equity jurisdiction, since the Maryland courts apply the local three-year statute of limitations[9] in both types of suits (*Wilhelm* v. *Caylor*, 32 Md. 151, 157; see *Jones* v. *Burgess*, 176 Md. 270), the period of that statute is properly to be applied in the federal courts where as here the suit is analogous to an action of account. *Russell* v. *Todd*, 309 U. S. 280, 289, 293. But the holding of laches does not rest on that ground alone. The court also held that, without reference to the state statute, the suit is barred under the principle that equity will not aid a plaintiff whose unexcused delay, if the suit were allowed, would be prejudicial to the defendant. *Wagner* v. *Baird*, 7 How. 234, 258; *Speidel* v. *Henrici*, 120 U. S. 377, 387; *Russell* v. *Todd*, 309 U. S. 280, 287, 289.

Petitioners have failed in any way to meet the point that no explanation, much less an excuse, has been offered for their obviously prejudicial delay of 19 years in bringing suit.[10] They show no conflict with the authorities upon which the decision rests and they further admit (Pet. 42):

> A Court of Equity applies the rule of laches according to its own ideas of right and justice, every case being governed by its own circumstances.

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[9] 2 Maryland Annotated Code (Flack 1939), Art. 57, sec. 1, p. 2456, provides:

> "All actions of account, actions of *assumpsit*, or on the case * * *, actions of debt on simple contract, detinue or replevin, all accounts for trespass for injuries to real or personal property * * * shall be commenced, sued or issued within three years from the time the cause of action accrued * * *."

[10] Pertinent to petitioners' assertion of "censurable and inequitable" conduct by respondent (Pet. 40) is the fact, pointed out by the courts below that in a suit against respondent by other employees on essentially the same facts and theory, the Circuit Court for Baltimore County in 1926 held that respondent was not bound by any enforceable contract of employment by virtue of the alleged agreements entered into in pursuance of decisions of the Labor Board (R. 40-41, 58).

None of the decisions cited by petitioners are in point.—There has been no fraud, concealment, unconscionable conduct or continuing affirmative wrong such as were the bases of the decisions on which petitioners rely (Pet. 41-42). Nor are the facts here at all comparable with the other cases cited by petitioners (Pet. 43).

Here two courts and four judges, after obviously careful consideration of the circumstances have concurred in the view that it would be contrary to equity and justice to permit the petitioners, after almost two decades of inaction, to force upon respondent the radically increased burden of defending such a suit.

> The lapse of time carries with it the memory and life of witnesses, the muniments of evidence, and other means of proof. The rule which gives it the effect prescribed is necessary to the peace, repose and welfare of society. (*Brown* v. *County of Buena Vista*, 95 U. S. 157, 161)

CONCLUSION

The decision of the circuit court of appeals is correct and presents neither a conflict of decision nor a question of substance or general importance. Therefore, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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